88-763

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

v.

CRAIG JOSEPH SERRANO,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

DONALD E. MARTIN
INGHAM COUNTY PROSECUTOR

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STATEMENT OF THE QUESTION PRESENTED

I

SHOULD THE EXCLUSIONARY RULE BE APPLIED TO EVIDENCE DISCOVERED WHERE POLICE ENTERED A RESIDENCE FOR THE PURPOSE OF CONTACTING THE MOTHER OF A 14-YEAR-OLD RAPE VICTIM; WHERE THE MOTHER WAS NEEDED AT A HOSPITAL WHERE THE DAUGHTER HAD BEEN TAKEN FOR MEDICAL EXAMINATION; AND WHERE THE OFFICERS COULD NOT HAVE OBTAINED A SEARCH WARRANT BECAUSE THEY HAD NO FACTS WHICH WOULD LEAD THEM TO CONCLUDE THAT THE PERPETRATOR OF THE RAPE OR EVIDENCE OF THE CRIME WAS LOCATED IN THE RESIDENCE?

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PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by Donald E. Martin, Ingham County Prosecuting Attorney, and by Robert B. Ebersole, Chief Appellate Attorney, and pray that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in the above cause on May 20, 1988, leave denied by the Michigan Supreme Court on September 8, 1988.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The Order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B. The oral opinion of the trial court is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 20, 1988. The order of the Supreme Court was entered on September 8, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

> seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

For purposes of this petition, the pertinent facts may be adduced from the opinion of the Michigan Court of Appeals and some additional material which is taken from the oral opinion rendered by the trial court:

"Defendant entered a conditional plea of no contest to first degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(f), and breaking and entering with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. Defendant was sentenced to concurrent terms of six to fifteen years imprisonment on each count. The parties agreed that defendant could plead no contest while preserving for appeal the issue of the denial of his motion to suppress the evidence against him.

The facts are undisputed. In the, early morning hours of August 15, 1986, officers of the East Lansing Police Department were dispatched to investigate an alleged breaking and entering and act of criminal sexual conduct at 1622 Wintercrest. They discovered the victim, a 14-year old girl, in bed. She told the officers that she thought that her attacker was a man her mother had recently dated. She thought his name was 'D.J. or Chris or Craig.' She told the officers that the man had a funny odor like cologne, and that he looked at her in a funny way, like a man her mother used to date. She also said that her mother was not home, as she was out with D.J. that night. Officer Hinz testified that after the victim said this, be [sic] believed D.J., Chris and Craig were the same

person, and that this man could not have been the girl's attacker, as the man was out on a date with the girl's mother at the time. Following some investigation, Officer Hinz found out the type of car D.J. owned, and through a license plate check, found out that D.J.'s name was Duane Rossman.

While one of the officers took the victim to the hospital, Officer Hinz remained at the scene for approximately an hour and a half collecting evidence. He then attempted to locate the girl's mother, Mrs. Karen Boyer, to inform her of the incident. After going to a few townhouses in the same complex, one neighbor said that Rossman lived at 1618 Wintercrest. Officer Hinz went to that address, saw Mrs. Boyer's car parked in front, and began knocking on the door. He

received no answer. He dispatched a telephone call to the apartment, but the phone was not answered. He then began banging on the door with his flashlight, and called for three other officers, Officers Johnstone, Austreng, and Sauve. When the officers arrived, Officers Hinz and Sauve tried the door, and found it unlocked. The [sic] entered the apartment. After walking through the kitchen and living room, they ascended the stairs. Upstairs, they found a bedroom door partially open, and observed a female, whom they believed to be Mrs. Boyer, in bed with a man. Officer Hinz yelled to awaken them. He and Officer Sauve proceeded down the hallway, and they came upon a closed bedroom door. Officer Sauve opened this door, and they discovered defendant sleeping on the bed.

Their yells woke defendant up. They instructed him to get up and produce identification. Defendant was clad only in underwear, and they noticed blood on his underwear and on his hands. The officers also noticed that he fit the description of the girl's attacker. Officer Hinz ordered defendant to change underwear, put on a pair of pants, and accompany one of the officers to the police station. Officer Hinz testified that at this point, defendant was under arrest. At the station, defendant signed a form consenting to a search of his bedroom. Later, Officer Hinz obtained a search warrant for defendant's body." Appendix A, pp 1a-6a.

Additionally, the trial judge made the following statement in his ruling: "Now, I don't discern from what I have

heard from the evidence that the police entered the apartment for the purpose of making a search. They entered the premises for legitimate purpose, the Court finds, of attempting to locate the young lady's mother. They had information that her boyfriend's car was parked out back, I believe, and the mother's car was parked out front or vice versa. In any event, both the boyfriend and the mother's car were there, that information that she may be on this premises.

They attempted to rouse her. They were unsuccessful in their initial attempts. They then entered the premises, the Court finds, they entered it for purpose of attempting to allevaite [sic] the emergency which they had. An emergency involved, the Court finds, obtaining medical assistance for the young

lady at the hospital, there was, from the evidence, an immediate need for the assistance for the protection of her health. Whatever, it was not primary, the Court finds, for the purpose of an arrest or for seizure or for search and seizure of evidence. And there was a reasonable basis to associate the emergency with this particular area. The police have a legitimate belief, a reasonable belief that the mother may be on the premises.

Then they discovered the Defendant at that point in time. They, the Court finds, discovered a nexus between the item, the blood and shorts, and the blood on the gentleman's hands, between those items, and the alleged criminal behavior. They did not have to engage in pure speculation. They did not have to engage in mere suspicion. That was

justification. The Court is satisfied that the testimony establishes that this evidence would be lost, devoid or removed during the time acquired by them to go obtain a search warrant. This is what the courts have called Evanescent, E-v-a-n-e-s-c-e-n-t. In other words. [sic] Pilate, washing his hands to wash away the blood, not like Lady MacBeth attempting to rub it out. But, in any event, he could have destroyed the evidence. There was an eminent threat to the destruction of the evidence.

Now, the scope in their search, at that point, the Court finds, to be reasonable. It was a search of his person similar to that outlined in Cupp versus Murphy. In U.S. Versus Rizzo, that additional indication of Schmerber, S-c-h-m-e-r-b-e-r versus California, which is at

384 US 750, which dealt with the body." Appendix C, pp 21a-23a.

The Michigan Court of Appeals reversed on the ground that the respondent's Fourth Amendment rights had been violated. The exclusionary rule was invoked. The Michigan Court of Appeals relied upon the United States Constitution, the Michigan Constitution, and Wong Sun v United States, 371 US 471, 488; 83 S Ct 407, 417; 9 L Ed 2d 441, 455 (1983).

The People applied for leave to the Michigan Supreme Court. The People argued that no search had occurred. Alternatively, it was pointed out that the officers were confronted with arguably exigent circumstances which permitted entry, and thereafter discovered the evidence inadvertently pursuant to the so-

called plain view doctrine. Finally, the People alleged that there was room to argue that attenuation had occurred when the defendant consented to a search after his initial arrest. Leave was denied on September 8, 1988.

REASONS FOR GRANTING THE WRIT

Petitioner would first argue that the decision below does not rest entirely upon state grounds. It is obvious, from the Court of Appeals' opinion, that the Federal Constitution was the touchstone of the analysis made. To the extent that the Court of Appeals relied upon Michigan case law, it is Petitioner's position that those cases have federal antecedents and are firmly grounded in federal constitutional principles. The opinion does not show or demonstrate in any way that adequate and independent state constitutional grounds were the basis of the decision, and it is apparent that this state court made its decision on the basis of federal law. Michigan v Long, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

A. No Legal Search Occurred in the Case at Bar

The definition of a search found in Black's Law Dictionary, Fifth Ed. is, "an examination of a man's house or other buildings or premises, . . . with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged." Michigan case law has similarly defined a search in the following language:

> "A 'search' in the constitutional sense implies a 'prying into hidden places for that which his concealed and that the object searched for has been hidden or intentionally putout of the way'. Weltz v State (Alaska, 1967) 431 P2d 502, 505. Such a definition recognizes the gist of the protection afforded by the Fourth Amendment -- protection of the individual from unreasonable invasion of privacy."

> People v Eddington, 23 Mich App 210, 225; 170 NW2d 686 (1970), rev'd on other grounds, 387 Mich 551 (1972).

One treatise noted that this Court has not set out a clear definition of the word "search" and cautions that not every activity involving seeking is a search under the Fourth Amendment. LaFave, Search and Seizure, §2.1(a), pp 301-303.

No search occurred in the case at bar. The officers entered without probable cause to believe that any evidence of crime would be located in the dwelling and with no reason to believe that the perpetrator would be encountered. Indeed, the officers felt quite the reverse. There having been no legal search, reliance on the Fourth Amendment and the exclusionary rule was improper.

B. If a Search Occurred, Exigent Circumstances were Present and it was Justified

This Court has been reluctant to expand the doctrine of exigent circumstances much beyond emergency conditions such as the hot pursuit of fleeing felons, the imminent destruction of evidence, or an on-going fire that requires immediate extinguishment. Welsh v Wisconsin, 466 US 740; 104 S Ct 2091; 80 L Ed 2d 732 (1984). The burden is upon the government to overcome the presumption of unreasonableness when warrantless entry of a residence is analyzed. 80 L Ed 2d at 743.

In the case at bar the officers testified that they entered this residence in order to find the mother of a 13-year-old rape victim. The victim was at a hospital and the mother was needed to

assist in the examination and treatment process. The officers acted pursuant to a Michigan court rule which required that parents be notified immediately where a child was in police custody in the following language: "When an officer takes a child into custody, the officer shall forthwith notify the parent, guardian, or custodian if one of them can be found." PCR 5.902(C). The child had been apparently taken into police custody pursuant to another section of that same court rule which states, "A child under the age of 17 may be taken into temporary custody by a peace officer without the order of the court: (4) if the conditions or surroundings under which the child is found endanger the child's health, morals, or welfare . . ." PCR 5.902(B)(4).

It is the position of Petitioner that a sufficient emergency existed to justify the entry of one or more officers into this residence in the early morning hours. Strenuous attempts had been made to rouse occupants. When no response was received, the officers, believing that the mother of the victim was needed at the hospital, entered in order to find her. This emergency was a justifiable reason for the entry.

It should be noted that the police officers in the case at bar could not have obtained a warrant to enter the residence. Only where the government has good reason to believe that incriminating evidence will be found, will a warrant be allowed under the Fourth Amendment. Zurcher v Stanford Daily, 436 US 547; 98 S Ct 1970; 56 L Ed 2d 525 (1978). A Michigan statute

similarly limits the ability of officers to get warrants and describes such things as fruits or instrumentalities of crime as well as evidence of crime. The full text of the statute is found in Appendix D.

There being no reason to believe that the permissible objects of a search warrant were located inside this dwelling at the time the officers entered, no search warrant would have issued. The officers could not have demonstrated to a neutral magistrate that there was probable cause to believe that evidence of a particular sort which would assist in a criminal prosecution could be located inside this dwelling. Dalia v United States, 441 US 238; 99 S Ct 1682; 60 L Ed 2d 177, 191 (1979).

Since the officers were lawfully on the premises, the evidence which they

encountered, specifically the blood on defendant's hands and his underwear, was seized pursuant to the plain view doctrine. The initial intrusion was lawful, the discovery of the material was inadvertent, and it was immediately apparent to the officers that the evidence was before them. Coolidge v New Hampshire, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971); Texas v Brown, 460 US 730; 103 S Ct 1535; 75 L Ed 2d 502 (1983).

The lawfulness of the entry has been demonstrated. The discovery was inadvertent. No testimony exists to demonstrate on this record that the officers entered the residence or defendant's bedroom seeking evidence. Rather, they were attempting to notify the mother of the rape victim that her daughter needed her at the hospital.

Finally, it is also apparent that the evidentiary value was immediately obvious. The defendant had blood on his underwear and upon his hands. He fit the description of the perpetrator. The officers knew at once that they had encountered a suspect.

The exigent circumstances line of reasoning should have been applied to the case at bar, and should have resulted in affirmance. The appellate court did not properly analyze this situation. The law was not properly applied to the facts. The case presented the officers with an arguable emergency and their initial entry was reasonable. See Michigan v Tyler, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978).

C. Sufficient Attenuation Occurred Between the Intrusion and the Subsequent Consent to Permit Use of the Evidence

Assuming, arguendo, that an impermissible entry was made, attenuation should still be considered. If a showing can be made that the primary taint has been purged, the evidence might still be used. Wong Sun, supra. Although the government will have the burden of persuasion, the defendant must still go forward with some evidence demonstrating that a taint exists. Alderman v United States, 394 US 165; 89 S Ct 961; 22 L Ed 2d 176 (1969). Consent may result in attenuation. Wong Sun, supra.

Here, no claim has been made that the consent was involuntary. No evidence of psychological coercion has been placed upon this record below. Therefore, the Michigan courts should have permitted this

evidence to be admitted, even if they felt that there was an initial illegal search. Although the trial court did not reach this question, the Court of Appeals was clearly aware that consent was given subsequent to defendant's arrest. It occurred at the police station and after the intrusion.

D. The Exclusionary Rule Should not Apply to these Facts

The exclusionary rule was improperly applied in the case at bar. These officers did not enter a private dwelling to search for fruits or instrumentalities of a crime, or for a perpetrator. Rather, they were seeking the mother of a young victim who was at a hospital. Application of the rule of exclusion in the case at bar does not further the purpose underlying that rule, to deter disrespect

for the Constitution. Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1061 (1961).

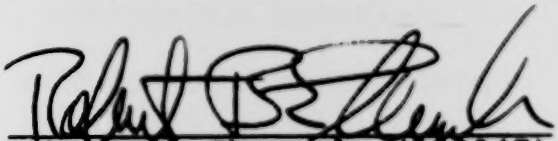
This Court should grant plenary review. The decisions relied upon above are not precisely on point and there is a need to further explain the exigent circumstances exception. Furthermore, it appears that the decision reached by the court below would have been decided differently had this Court's case law been applied correctly. Proper analysis under the above-cited case law would have led the Court of Appeals to reach a different result, and the decision should be overturned. Because this Court's precedents do not clearly speak to the factual context which arose here, and because the court below gave a more restrictive interpretation than required, this Court should grant plenary review.

CONCLUSION

WHEREFORE, for the reasons above stated Petitioner submits that plenary review should be granted.

Respectfully submitted,

DONALD E. MARTIN
INGHAM COUNTY PROSECUTOR



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APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 101433

v

5/20/88

CRAIG JOSEPH SERRANO,
Defendant-Appellant,
/

BEFORE: W. R. Beasley, P.J., H. Hood and R. Tahvonen *, JJ.

PER CURIAM

Defendant entered a conditional plea of no contest to first degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and breaking and entering with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. Defendant was sentenced to concurrent terms of six to fifteen years imprisonment on each count. The parties

* Circuit judge, sitting on the Court of Appeals by assignment.

agreed that defendant could plead no contest while preserving for appeal the issue of the denial of his motion to suppress the evidence against him.

The facts are undisputed. In the, early morning hours of August 15, 1986, officers of the East Lansing Police Department were dispatched to investigate an alleged breaking and entering and act of criminal sexual conduct at 1622 Wintercrest. They discovered the victim, a 14-year old girl, in bed. She told the officers that she thought that her attacker was a man her mother had recently dated. She thought his name was "D.J. or Chris or Craig." She told the officers that the man had a funny odor like cologne, and that he looked at her in a funny way, like a man her mother used to date. She also said that her mother was

not home, as she was out with D.J. that night. Officer Hinz testified that after the victim said this, he believed D.J., Chris and Craig were the same person, and that this man could not have been the girl's attacker, as the man was out on a date with the girl's mother at the time. Following some investigation, Officer Hinz found out the type of car D.J. owned, and through a license plate check, found out that D.J.'s name was Duane Rossman.

While one of the officers took the victim to the hospital, Officer Hinz remained at the scene for approximately an hour and a half collecting evidence. He then attempted to locate the girl's mother, Mrs. Karen Boyer, to inform her of the incident. After going to a few townhouses in the same complex, one neighbor said that Rossman lived at 1618

Wintercrest. Officer Hinz went to that address, saw Mrs. Boyer's car parked in front, and began knocking on the door. He received no answer. He dispatched a telephone call to the apartment, but the phone was not answered. He then began banging on the door with his flashlight, and called for three other officers, Officers Johnstone, Austreng, and Sauve. When the officers arrived, Officers Hinz and Sauve tried the door, and found it unlocked. The [sic] entered the apartment. After walking through the kitchen and living room, they ascended the stairs. Upstairs, they found a bedroom door partially open, and observed a female, whom they believed to be Mrs. Boyer, in bed with a man. Officer Hinz yelled to awaken them. He and Officer Sauve proceeded down the hallway, and they

came upon a closed bedroom door. Officer Sauve opened this door, and they discovered defendant sleeping on the bed. Their yells woke defendant up. They instructed him to get up and produce identification. Defendant was clad only in underwear, and they noticed blood on his underwear and on his hands. The officers also noticed that he fit the description of the girl's attacker. Officer Hinz ordered defendant to change underwear, put on a pair of pants, and accompany one of the officers to the police station. Officer Hinz testified that at this point, defendant was under arrest. At the station, defendant signed a form consenting to a search of his bedroom. Later, Officer Hinz obtained a search warrant for defendant's body.

The officers testified that their primary purpose in going to the apartment was to locate Mrs. Boyer and tell her that her daughter had been sexually assaulted and that she was in the hospital. They testified that their secondary purpose was to make sure all the occupants were all right.

Defendant argued at the hearing on his motion to suppress that the entry into the apartment, shared by him and Duane, and then into his bedroom, violated the fourth amendment[1] protection against unreasonable searches and seizures. The prosecutor argued that the police were lawfully on the premises and that the subsequent search of defendant was allowed under the "plain view" exception to the warrant requirement. The court found that the officers legitimately entered the

apartment to locate Mrs. Boyer. The court found that the officers inadvertently came upon defendant, and that the subsequent warrantless search of defendant was permissible because it was inadvertent and because defendant could have disposed of the evidence (i.e., he could have destroyed his underwear and washed the blood off his hands) before they had an opportunity to get a warrant. Thus, the court denied defendant's motion to suppress.

A search without a warrant is unreasonable per se unless there exists both probable cause and circumstances establishing one of the delineated exceptions to the warrant requirement. People v Preston Williams, 160 Mich App 656, 659-60; 408 NW2d 415 (1987). Probable cause has been defined as a state

of mind which stems from some fact, circumstance or information which would create an honest belief in the mind of a reasonably prudent person. More specifically, probable cause to search exists where facts and circumstances would warrant a person of reasonable prudence to believe that a crime has been or is being committed and that the evidence sought will be found in the stated place. In assessing whether probable cause exists, the facts, circumstances and information known to the officers at the time of the search must be examined. Id., 660.

A trial court's ruling at a suppression hearing will not be overturned unless that ruling is found to be clearly erroneous. People v Castle, 126 Mich App 203, 107; 337 NW2d 48 (1983), lv den 419 Mich 876 (1984). Once a warrantless

search has been shown, the state bears the burden of showing that the search is within an exception to the rule. Id.

There are six exceptions to the warrant requirement recognized by this Court: (1) searches incident to lawful arrests; (2) automobile searches and seizures; (3) plain view doctrine; (4) consent; (5) stop and frisk type searches; and (6) hot pursuit. Id. In addition, the police may enter a home without a warrant if exigent circumstances exist. Preston Williams, supra, 660.

The only exceptions which could apply to the instant case are the exception for exigent circumstances and the plain view exception. The officers would be justified in entering defendants' [sic] apartment without a warrant if exigent circumstances existed. Their subsequent

seizure of defendant's underwear could be upheld under the plain view doctrine, if the requirements of the doctrine were met. Exigent circumstances are present where immediate action in [sic] necessary to: (1) protect the police officers or other persons; (2) prevent the loss or destruction of evidence; or (3) prevent the escape of the suspect. Preston Williams, supra, 662. The exigent circumstances exception does not support the officers' entry into the apartment in the instant case. The officers testified that their primary purpose in entering was to find Mrs. Boyer. Although they also testified that a secondary purpose was to make sure the occupants were all right, the facts do not rise to the level of exigent circumstances. The officers did not have probable cause to believe that a

crime had been committed such that the entry was necessary to protect occupants of the apartment. They only knew that Mrs. Boyer's daughter had been attacked a few townhouses away. Probable cause did not exist to believe that persons in defendant's apartment were in danger. Thus, entry without a warrant was impermissible.

The plain view exception requires: (1) prior justification for intrusion into the otherwise protected area; (2) that the evidence is obviously incriminatory or contraband; and (3) that the discovery of the evidence is inadvertent. People v Blackburne, 150 Mich App 156, 165; 387 NW2d 850, lv den 425 Mich 869 (1986). The plain view exception also can not [sic] support the officers' seizure of defendant's underwear, as the officers'

initial intrusion into the apartment was not justified. Without a permissible initial entry, the plain view doctrine cannot support the subsequent entry into defendant's bedroom or search of defendant.

Thus, the court's denial of defendants [sic] motion to suppress was clearly erroneous. Because the warrantless entry into defendant's apartment and bedroom was a violation of defendant's fourth amendment right to be free from unreasonable search and seizures, all the evidence seized from defendant must be suppressed. Wong Sun v United States, 371 US 471, 488; 83 S Ct 407, 417; 9 L Ed 2d 441, 455 (1983).

Reversed and remanded for new trial.

/s/William R. Beasley
/s/Harold Hood
Judge Randy L. Tahvonen concurs in result only.
/s/Randy L. Tahvonen

1. US Const, Am IV; Const 1963, art 1, §11.

APPENDIX B
MICHIGAN SUPREME COURT

ORDER
Entered: September 8, 1988

83493

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 83493
COA: 101433
LC: 86-55908-FC

CRAIG JOSEPH SERRANO,
Defendant-Appellee,

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of

the order entered at the direction of the Court.

September 8, 1988 /s/Corbin R. Davis

APPENDIX C

ORAL OPINION OF THE HONORABLE THOMAS L. BROWN, INGHAM COUNTY CIRCUIT JUDGE

March 20, 1987

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v CCT: 86-55908-FC

CRAIG JOSEPH SERRANO,

Defendant,

(Excerpt of 3/20/87 Transcript, pp 85-91)

THE COURT: Okay. Well, gentlemen, the Court would prefer analyzing this case on the basis of search of a person rather than search of a place.

Now, certainly the Defendant had a legitimate expectation of privacy in his own bedroom, which was disturbed by the police entering into it and they obviously had no warrant to conduct any search of that premises.

Now, when they entered they had no probable cause as far as I can view the evidence that the Defendant was involved in anything other that [sic] he was even there.

Now, in the case of Cupp, C-u-p-p, versus Murphy, 412 US 291, a 1973 case, the Defendant was being questioned by the police regarding a murder of his estranged wife. During the questioning, which was submitted to by the Defendant voluntarily, the police noticed dark stains under his fingernails. This was consonant of the fact that the blood of strangulation victims often appeared under strangulars' nails. Police asked the Defendant if they could scrape his nails. He refused and he made movements indicating he was attempting to remove the debris from under his nails. The police seized the

Defendant, scraped the debris, which proved to contain traces of the decedent's blood as well as fabric of her nightgown.

Now, the Court in Cupp finds that the nature of the evidence, the fact that the Defendant was aware of the police's interest in it, and the mere impossibility of the fact that the Defendant was aware of the police's interest in it, and the mere impossibility of preventing the Defendant from destroying it short of complete physical restraining, justified the immediate action in place.

I also have the case of U.S. Versus Rizzo, R-i-z-z-o, which is at 583 Federal 2nd 907 7th case. FBI agents were investigating a defendant, a private investigator suspected of illegally wiretapping the friends of spouses during marital disputes. Agents were searching

the defendant's car pursuant to a warrant when the defendant approached the vehicle with a tape cassette in hand. Believing the cassette to contain evidence of illegal wiretapping. [sic] The gents seized it and the Court upheld this warrantless search by the agents stating if they had deferred seizing the cassette, until they obtained a warrant for its seizure, it would surely have been erased or secreted. It was thus an exigent circumstance making a formal arrest without a warrant prior to seizing the cassette was not required.

Now, there is case law in this regarding hot pursuit. Warden versus Hayden, 387 US 294 which also is spoken of in People v Mitchell, which is 347 Northeast 2nd 607, wherein similarly was denied by Supreme Court at U.S. Supreme

Court, U.S. 63, which gives the police a limited privilege to conduct warrantless searches and People v Mitchell sets forth limited privilege.

Now, I don't discern from what I have heard from the evidence that the police entered the apartment for the purpose of making a search. They entered the premises for legitimate purpose, the Court finds, of attempting to locate the young lady's mother. They had information that her boyfriend's car was parked out back, I believe, and the mother's car was parked out front or vice versa. In any event, both the boyfriend and the mother's car were there, that information that she may be on this premises.

They attempted to rouse her. They were unsuccessful in their initial attempts. They then entered the premises,

the Court finds, they entered it for purpose of attempting to allevaite [sic] the emergency which they had. An emergency involved, the Court finds, obtaining medical assistance for the young lady at the hospital, there was, from the evidence, an immediate need for the assistance for the protection of her health. Whatever, it was not primary, the Court finds, for the purpose of an arrest or for seizure or for search and seizure of evidence. And there was a reasonable basis to associate the emergency with this particular area. The police have a legitimate belief, a reasonable belief that the mother may be on the premises.

Then they discovered the Defendant at that point in time. They, the Court finds, discovered a nexus between the item, the blood and shorts, and the blood

on the gentleman's hands, between those items, and the alleged criminal behavior. They did not have to engage in pure speculation. They did not have to engage in mere suspicion. That was justification. The Court is satisfied that the testimony establishes that this evidence would be lost, devoid or removed during the time acquired by them to go obtain a search warrant. This is what the courts have called Evanescent, E-v-a-n-e-s-c-e-n-t. In other words. [sic] Pilate, washing his hands to wash away the blood, not like Lady MacBeth attempting to rub it out. But, in any event, he could have destroyed the evidence. There was an eminent threat to the destruction of the evidence.

Now, the scope in their search, at that point, the Court finds, to be

reasonable. It was a search of his person similar to that outlined in Cupp versus Murphy. In U.S. Versus Rizzo, that additional indication of Schmerber, S-c-h-m-e-r-b-e-r versus California, which is at 384 US 750, which dealt with the body. Intrusion that causes a blood alcohol test was made by removing blood from a needle from one of the suspects. This test was made after an arrest, but the Court held that the body of this intrusion in [sic] like search of the person cannot be justified and the search incident to arrest, rationale, the Court held the nature of the intrusion requires that there exists a clear indication that the incriminating evidence is present in the body and in the strict standards Turner requires judicial scrutiny to the warrant requirement.

However, in Schmerber, the Court finds that because the nature of the evidence was highly Evanescent. In other words, could disappear within several hours. After all, you know if you drink alcohol in a few hours, your blood is returned to normal. The Court held it could disappear. Therefore, the warrant to search was permissible because of that fact that the evidence could disappear and for that and other reasons the Court finds that to be the case here.

Now, they didn't enter this home, the Court finds, for any reason to arrest anyone or to seize any evidence or to search for anything. They had evidence, the Court finds, that someone named DJ was named by the victim, but Officer Hinz testified that he knew it wasn't DJ, because DJ was out with the mother, he

couldn't be in two places at one time, whatever that to be the case, that's certainly only common sense. No one can be at two places at once. He did not enter, the Court finds, for purposes of investigating an arrest or seizure or search for evidence. It was inadvertent. Perhaps not quite to the plain view doctrine.

The Court does not believe Arizona versus Hicks applies. In Arizona versus Hicks, the items had to be moved, they had no probable cause to believe that these parties were in possession of the stolen property. And the items had to be moved around in order for them to make that determination. That doesn't fit the facts of this case. The police didn't have to ask the Defendant to stand up, turn around, things of this sort. What they

really saw was there to be seen so the Court finds that the evidence seized, at least to the extent of the shorts and the blood samples under the nails, or on the hand or whatever, may be admissible evidence in this case. The Court denies the motion. See you at one 1:00.

(Whereupon, proceedings adjourned.)

APPENDIX D

MCL 780.652; MSA 28.1259(2)

"A warrant may be issued to search for and seize any property or other thing which is either:

(a) Stolen or embezzled in violation of any law of this state.

(b) Designed and intended for use or which is or has been used as the means of committing a criminal offense.

(c) Possessed, controlled or used wholly or partially in violation of any law of this state.

(d) Evidence of crime or criminal conduct on the part of any person.

(e) Contraband.

(f) The bodies or persons of human beings or of animals, who may be the victims of a criminal offense.

(g) The object of a search warrant under any other law of this state providing for same. If a conflict exists between this act and any other search warrant law, this act shall be deemed controlling."